

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

AMERIPRIDE SERVICES, INC.,
A Delaware corporation,

Plaintiff,

v.

VALLEY INDUSTRIAL SERVICE, INC.,
a former California corporation,
et al.,

Defendants.

AND CONSOLIDATED ACTION AND
CROSS- AND COUNTER-CLAIMS.

NO. CIV. S-00-113 LKK/JFM

The matter is before the court on Huhtamaki Food Service, Inc.'s ("Huhtamaki" or "plaintiff") motion to strike defendant AmeriPride Services, Inc.'s ("AmeriPride") notice of seven rebuttal experts and the rebuttal expert report of Peter Mesard. In the alternative, Huhtamaki requests leave of the court to again depose Mesard, and to take the depositions of AmeriPride's seven designated rebuttal experts. AmeriPride opposes this motion. I

1 decide the matter based on the pleadings, the parties' papers, and
2 after oral argument.

3 **I.**

4 **BACKGROUND**

5 On July 29, 2004, Huhtamaki brought suit against AmeriPride
6 for losses arising out of contamination relating to its water
7 supply wells. Huhtamaki's complaint contains seven causes of
8 action: Cost recovery under CERCLA; cost recovery under the
9 California Carpenter Presley-Tanner Hazardous Substance Account
10 Act; public nuisance; private nuisance; trespass; negligence; and
11 declaratory judgment.

12 The court issued a Status Order on December 10, 2004 in 04-
13 1494, stating that discovery would close on December 6, 2005.
14 On November 4, 2005, the court consolidated Civ. S-00-113 with Civ.
15 S-04-1494. On December 13, 2005, the court vacated the discovery
16 dates and reset the discovery deadline for both cases for May 15,
17 2006, making the deadline for the filing of expert reports and
18 designation March 15, 2006. On February 22, 2006, the court
19 granted the parties' stipulation to extend the deadline for
20 designation of experts and for exchange of expert reports to April
21 7, 2006.

22 On April 7, 2006, the parties filed their designation of
23 experts and expert reports pursuant to the court's order. Between
24 May 1 and May 12, 2006, the parties deposed the experts in order
25 to meet the court's May 15, 2006 discovery deadline. On April 17,
26 2006, AmeriPride's counsel notified Huhtamaki that it was

1 "contemplating an expert rebuttal extension until after the end of
2 discovery" Kaplan Dec., Ex. 7.

3 Huhtamaki's counsel, Stephen Darmody, "would not commit to
4 extend the date for rebuttal expert disclosures" [beyond the close
5 of discovery] but "asked that AmeriPride produce its rebuttal
6 report(s) before the May 8 Federal Rules deadline." Kaplan Dec.

7 ¶ 6. Darmody did not, at that point, state that rebuttal experts
8 were barred by the Court's orders. Opp'n at 4-5. Due to some
9 delays on the Court's CM/ECF system, AmeriPride left the rebuttal
10 expert disclosures in the court's drop box on May 8. Kaplan Dec.

11 ¶ 7. AmeriPride filed with the court a rebuttal expert report for
12 Peter Mesard and "designated" seven other experts, but failed to
13 file any reports as to those seven experts.

14 AmeriPride states that because Huhtamaki refused to extend the
15 rebuttal expert deadlines, it acquiesced "to the May 8, 2006
16 rebuttal disclosure date" that both parties agreed to and that it
17 worked on a schedule to meet that agreed-upon deadline,
18 "incurr[ing] over \$30,000 in fees in doing so." Opp'n at 5.

19 AmeriPride states that had Huhtamaki timely taken the position that
20 rebuttal experts were barred by the Court's orders, AmeriPride
21 would have "sought leave to amend these orders." Opp'n at 6.

22 **A. EXPERT REBUTTAL REPORT AND DESIGNATIONS IN RESPONSE TO**
23 **HUHTAMAKI'S DESIGNATED EXPERTS (ROBERT STOLLAR AND**
ANTHONY BROWN)

24 AmeriPride contends that its Mesard Expert rebuttal report and
25 its seven expert designations are necessary to rebut the
26 information disclosed after the depositions of environmental

1 engineer Robert Stollar and site assessor/building contractor
2 Anthony Brown, two experts designated by Huhtamaki. AmeriPride
3 states that its rebuttal expert reports and designations are not
4 improper because it could not have anticipated the testimony of
5 Stollar and Brown. AmeriPride explains that it had no way of
6 previously knowing that Stollar, an environmental engineer, had no
7 experience in the industrial laundry industry, which became
8 apparent at his deposition. Opp'n at 3.

9 AmeriPride also explains that it had no way of knowing that
10 Brown, a site assessor/building contractor, would offer his lay
11 opinion as to how Huhtamaki's pumping of ground water would affect
12 the groundwater plume. Mr. Brown stated in his deposition that
13 Huhtamaki's pumping of hundreds of thousands of gallons of water
14 every day from its water well did not significantly affect the
15 groundwater plume. Id. To rebut the testimony of Brown and
16 Stollar, AmeriPride wishes to submit Mesard's expert rebuttal
17 report and to designate seven rebuttal experts.¹

18 II.

19 ANALYSIS

20 Huhtamaki contends that AmeriPride attempted to "game the
21 rules . . . by filing an unauthorized and improper expert rebuttal
22 designation," which is "contrary to the Court's Rule 16 Scheduling

23 ¹ The seven rebuttal experts designated by AmeriPride are:
24 Frank Olszowy, Fraukh Moshen, Jeff Thuma, Cass Landon, Russ
25 Greaver, Bernard Berry, and John Dankoff. Although some of these
26 individuals have been previously deposed by AmeriPride or other
parties in this litigation, none have been previously designated
as experts by AmeriPride.

1 order" Pl.'s Mot. to Strike at 2. AmeriPride, on the
2 other hand, insists that it was justified in filing the Mesard
3 rebuttal report and the additional rebuttal expert designations
4 because Huhtamaki's counsel "asked that AmeriPride produce its
5 rebuttal report(s) before the May 8 Federal Rules Deadline," even
6 though Huhtamaki refused an extension beyond the discovery cut off
7 date. Opp'n at 4-5. AmeriPride contends that "Fed. R. Civ. P.
8 26(A)(2)(C) states that the rebuttal expert disclosures are due 30
9 days after initial expert disclosures, unless the Court orders a
10 different date," and that "[t]he court did not order a different
11 date." Opp'n at 5. AmeriPride's position is not defensible.

12 This court's Status Order filed on December 10, 2004 in 04-
13 1494, the case at issue in this motion, provided that:

14 all counsel are to designate in writing and file with
15 the court and serve upon all other parties a final list
16 of the names of all experts that they propose to tender
17 at trial not later than sixty (60) days before the close
18 of discovery herein established. Accompanying the
19 designation shall be the written report specified in
20 Fed. R. Civ. P. 26 A2B (emphasis supplied). All experts
21 so designated are to be fully prepared to render an
22 informed opinion at the time of designation so that they
23 may fully participate in any deposition taken by the
24 opposing party.

25 Indeed, Fed. R. Civ. P. 26(A)(2)(c) provides that, in the
26 absence of a contrary court order, a party may disclose the
identity of an expert whose testimony is intended only to
contradict or rebut evidence offered by another party's expert
thirty days after disclosure of the other party's expert. The
court's status order made clear, however, that the parties were
directed to follow a different time line and that the parties were

1 to disclose all experts at least 60 days before the close of
2 discovery.²

3 The court notes that Huhtamaki may have misled AmeriPride into
4 spending \$30,000 more to prepare its rebuttal experts and the
5 rebuttal report by "ask[ing] AmeriPride" to "produce its rebuttal
6 report(s) before the May 8 Federal Rules deadline." Kaplan Dec.
7 at 3.³ As a result, AmeriPride relied on Huhtamaki's asserted
8 misrepresentations to AmeriPride's detriment. This reliance was
9 not justified as the status order was unambiguous in requiring the
10 designation of all experts by a particular date.⁴ Nevertheless,
11 given what appears to be less than straight-forward litigation
12 tactics on the part of Huhtamaki, and AmeriPride's reliance on
13 plaintiff's request for reports, Huhtamaki's motion to strike as
14 to Peter Mesard's rebuttal expert report is DENIED. Significantly,
15 Mesard was previously designated and an expert report was filed on
16 April 7, 2006. Mr. Mesard may rebut Brown's testimony at trial and
17 AmeriPride may rely on the rebuttal expert report at trial. No

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19 ² In their papers, Huhtamaki stated that it was their
20 position that rebuttal experts were not allowed. AmeriPride
21 contends that "the Court's silence on the issue" does not equate
22 into a "*sub silentio* opting out of the Federal Rules." Opp'n at
23 6. Why AmeriPride thinks that the Status Order using the words
24 "all experts" is ambiguous or constitutes "silence" is not
25 disclosed in their papers.

26 ³ Although Mr. Kaplan produced no other evidence besides his
declaration stating that Huhtamaki did make these representations
to AmeriPride, he "declare[ed] under penalty of perjury that the
foregoing is true and correct."

⁴ Although the original status order was amended, none of the
subsequently issued orders amended the court's requirements as to
the designation and disclosure of experts.

1 further deposition, however, shall be allowed as to Mr. Mesard.


2 As to the seven expert designations, Huhtamaki's motion to
3 strike is GRANTED as to those experts. In addition to instructing
4 the parties that all experts were to be designated 60 days before
5 the close of discovery, the court's Status Order stated
6 unambiguously that "[a]ccompanying the designation shall be the
7 written report specified in Fed. R. Civ. P. 26 A2B." Even if the
8 court allowed AmeriPride to designate seven rebuttal experts in
9 contravention of the court's December 2004 status order, AmeriPride
10 additionally violated the status order by failing to file expert
11 reports for these seven experts. Huhtamaki's motion to strike
12 these experts is therefore GRANTED.

13 **III.**

14 **CONCLUSION**

15 Huhtamaki's motion to strike is GRANTED in part, and DENIED
16 in part, as consistent with this order.⁵

17 IT IS SO ORDERED.

18 
19 LAWRENCE K. KARLTON
20 SENIOR JUDGE
UNITED STATES DISTRICT COURT

21 ⁵ Defendants also argue that their rebuttal disclosures were
22 in direct response to the unusual and unsubstantiated opinions of
23 Huhtamaki's experts and that AmeriPride could not anticipate this
24 testimony in advance. Opp'n at 6. The court's order allows for the
25 testimony of experts not previously designated under several narrow
26 circumstances, including in situations where the witness "could not
have been reasonably anticipated at the time the lists were
exchanged." In the instant case, each of the individuals
AmeriPride desired to designate as rebuttal experts were known to
AmeriPride at the time it made its first expert designations as
each had already been deposed in this matter or is a current
employee or consultant for AmeriPride.